

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/19/2001

CLERK OF THE COURT
FORM V000A

HONORABLE MICHAEL D. JONES

J. Pinter
Deputy

CV 2001-010671

FILED: _____

KIRSTIN L SIMKINS

KIRSTIN L SIMKINS
314 S 92ND PL
MESA AZ 85208-0000

v.

RONDA A BARTOLI

MERRILL W ROBBINS

MESA JUSTICE CT-EAST
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the file from the East Mesa Justice Court and Appellant's memoranda.

This case involves Appellant's appeal after a hearing on an Injunction Against Harassment obtained by Appellee, Kirstin L. Simkine. Appellee is the girlfriend of Appellant's ex-husband, who obtained an Injunction Against Harassment in the East Mesa Justice court on 05/03/01. The East Mesa Justice Court held a hearing on the Injunction Against Harassment at Appellant's, Ronda M. Bartoli, request on 06/04/01.

Appellant challenges the sufficiency of the evidence before the East Mesa Justice Court to continue the Injunction Against

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Harassment. When reviewing the sufficiency of the evidence, an appellate court must not re-weight the evidence to determine if it would reach the same conclusion as the original trier of fact.¹ All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.² If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Appellant.³ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁴ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁵ The Arizona Supreme Court has explained in State v. Tison⁶ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.⁷

¹ State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).

² State v. Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

³ State v. Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁴ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

⁵ Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

⁶ SUPRA.

⁷ Id. At 553, 633 P.2d at 362.

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This Court notes that Appellant has failed to order a recording or transcript of the proceedings, including the hearing on the Injunction Against Harassment. This Court is precluded from ordering a hearing de novo when the party who had the opportunity to request that a record be prepared failed to do so.⁸ This Court must presume that the record supports the trial judge's ruling when the record is silent because Appellant failed to make a record. Thus, this Court is compelled to reject Appellant's sufficiency of the evidence arguments.

Though not raised by Appellant, it is clear that Appellee had no legal authority to include Appellant's children within her Petition for Injunction Against Harassment or the proposed Order. A.R.S. Section 12-1809(A) provides in part:

If the person is a minor, the parent, legal guardian or person who has legal custody of the minor shall file the petition...

The children's father, Appellee's husband/boyfriend would clearly have the legal authority to seek protection on their behalf in a Domestic Violence Order of Protection. But, Appellee is/was, at best, the wife or girlfriend of the children's father. Appellee was not a parent or legal guardian of the children. It was error for the trial court to exercise jurisdiction over Appellant's three children in any manner.

Also not raised by Appellant, this Court is concerned that the modified Injunction Against Harassment issued by the trial court on 06/04/01 conflicts with a custody/visitation order that covers the children listed in paragraph 1 in the Injunction Against Harassment (Reeanna, Sawyer, and Deric Fernandez). Jurisdiction over child custody/visitation proceedings is vested exclusively with the Superior Court.⁹ The East Mesa Justice Court ordered in paragraph 3 of the modified Injunction Against Harassment that "the Defendant (Appellant, Ronda M. Bartoli)

⁸ Rule 1(b), Superior Court Rules of Appellate Procedure-Civil.

⁹ See A.R.S. Section 25-401(B).

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shall not contact persons listed above: in person; by phone; okay for certified letters from Defendant."¹⁰ Appellant has correctly interpreted paragraph 3 of the modified Injunction Against Harassment as precluding her from having any contact with her children, except by certified letter.

Visitation is defined in A.R.S. Section 25-402(5) as follows:

'Visitation' means the condition under which a parent has the right to have a child physically placed with the parent and the right and responsibility to make, during that placement, routine daily decisions regarding the child's care consistent with the major decisions made by a person having legal custody.

The East Mesa Justice Court's no contact order clearly conflicts with the Superior Court's exclusive jurisdiction over custody/visitation. The lower court included language in paragraph 5 which appears to be an attempt to limit the no contact order in paragraph 3: "Conformed subject to language from Superior Court, regarding visitation." However, an explicit no contact order is inconsistent with a visitation order.

This Court has concluded that the East Mesa Justice Court erred in exceeding its jurisdiction by granting Appellee's requested Injunction Against Harassment that included children which Appellee had no legal authority to request be included and by entering a no contact order which conflicted with Appellant's custody/visitation order that was in effect and covered the three children listed in paragraph 1 of the modified Injunction Against Harassment. Paragraph 3 of the amended order must be modified so as to exclude Appellant's children from the no contact order.

¹⁰ Modified Injunction Against Harassment, dated 06/04/01
Docket Code 512

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In situations where a parent or legal guardian does have standing to request that children who are the subject of a custody or visitation order be included within an Injunction Against Harassment, this Court suggests the following language may be helpful to avoid conflict with those custody/visitation orders:

It is the intent of this Court that this order (injunction) does not modify, amend, affect or diminish the parents' rights to custody, visitation, or access to children as previously granted in a custody decree or a visitation order from a court of competent jurisdiction.

IT IS ORDERED remanding this matter back to the East Mesa Justice Court for purposes of issuing a modified Injunction Against Harassment excluding Reeanna, Sawyer and Deric Fernandez, consistent with this opinion.